

FILED

Oct 31 2022

Mark B. Busby
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JONATHAN DIAZ and LEWIS
BORNMAN, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 5:21-CV-03080-NC

**ORDER GRANTING PLAINTIFFS'
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

1 This matter came before the Court for hearing via Zoom on October 11, 2022, pursuant to
 2 the Court's Preliminary Approval Order dated June 30, 2022 (Dkt. 71). The Court has considered
 3 the Settlement Agreement (the "Settlement") between Plaintiffs Jonathan Diaz and Lewis
 4 Bornmann ("Plaintiffs") and Google LLC ("Google" or "Defendant"), the settlement status report
 5 filed at Dkt. 76, any objections and comments received regarding the Settlement, the record in the
 6 Lawsuit, including the pending motion for final approval of the Settlement, and the arguments and
 7 authorities of counsel, including in any papers filed and proceedings had herein. Good cause
 8 appearing, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

9 1. Capitalized terms not otherwise defined herein shall have the same meaning as set
 10 forth in the Settlement Agreement. *See* Dkt. 64-1 (Exhibit 1).

11 2. This Court has jurisdiction over the subject matter of this Lawsuit pursuant to 28
 12 U.S.C. § 1332 and has personal jurisdiction over the Parties and all Settlement Class Members.
 13 Venue is proper in this District. All parties have consented to the jurisdiction of a U.S.
 14 Magistrate Judge pursuant to 28 U.S.C. § 636(c). Dkts. 9, 17.

15 3. The Court, for purposes of this Final Approval Order, (1) approves the Settlement
 16 described in Plaintiffs' preliminary and final approval papers; (2) enters this Order and a separate
 17 judgment pursuant to Federal Rule of Civil Procedure 58; and (3) adopts herein the terms and
 18 definitions set forth in the Settlement Agreement.

19 4. The Court finds that notice to the Settlement Class, as detailed in Plaintiffs'
 20 preliminary and final approval papers and as previously approved by this Court, was the best
 21 method for providing such notice that was practicable under the circumstances, and fully
 22 complied with the requirements of Federal Rule of Civil Procedure 23(c)(2)(A) ("For any class
 23 certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class"), this
 24 District's Procedural Guidance for Class Action Settlements, and due process. The approved and
 25 completed notice plan included sending targeted advertisements with a link to a case-specific
 26 settlement website (www.Googleexposurenotificationimprovements.com) (the "Settlement
 27 Website") to (1) websites and mobile apps likely to be visited and used by Settlement Class
 28 Members and (2) directly on the social media and entertainment platforms owned by Meta (i.e.,

1 Facebook and Instagram). The Settlement Website included the following information: (i) notice
2 of improvements made by Google to its EN System and information learned by Plaintiffs about
3 Google's management of EN System data that led to Plaintiffs' agreement to dismiss their claims
4 and settle, including descriptions of the injunctive relief and remedial measures; (ii) a summary of
5 the Lawsuit and the settlement; (iii) contact information for Class Counsel and the Settlement
6 Administrator, including a dedicated contact page with a toll-free number to ask questions about
7 the Settlement; (iv) important case documents, including the settlement agreement, Plaintiffs'
8 motions for preliminary and final approval, and Plaintiffs' motion for attorneys' fees, costs, and
9 incentive awards; (v) instructions on how to access the case docket via PACER or in person at
10 any of the court's locations and that class members who wish to object to the settlement must
11 send their written objections only to the court; and (vi) important case dates and deadlines,
12 including the objection deadline and date of the Final Approval Hearing.

13 5. There were no objections to the Settlement Agreement. *See* Dkt. 76

14 6. The Court finds that Defendant properly and timely notified the appropriate state
15 and federal officials of the Settlement, pursuant to the Class Action Fairness Act ("CAFA"), 28
16 U.S.C. § 1715.

17 7. The Court approves the Settlement as fair, reasonable, and adequate and in the best
18 interests of the Settlement Class Members, including under the "heightened fairness inquiry"
19 required for settlement agreements negotiated before class certification. *See Roes, 1-2 v. SFBSC*
20 *Mgmt., LLC*, 944 F.3d 1035, 1048-49 (9th Cir. 2019). The Court has specifically considered the
21 factors relevant to class settlement approval (*see, e.g., Churchill Village, L.L.C. v. General Elec.*,
22 361 F.3d 566 (9th Cir. 2004)), including, *inter alia*, the strength of Plaintiffs' case; the risk,
23 expense, complexity, and likely duration of further litigation; the risk of certifying the proposed
24 Settlement Class and – if successful – maintaining class action status throughout trial; the relief
25 provided for in the Settlement; the extent of discovery completed and stage of the proceedings;
26 the experience and views of Class Counsel and a highly-qualified mediator; and the reaction of
27 Settlement Class Members to the proposed Settlement. Furthermore, the Court has specifically
28

1 considered the factors relevant to class settlement approval set forth in Fed. R. Civ. P. 23(e) and
 2 this District's Procedural Guidance for Class Action Settlements, including whether:

- 3 (A) the Class Representatives and Class Counsel have adequately represented
 4 the Settlement Class;
- 5 (B) the Settlement was negotiated at arm's length;
- 6 (C) the relief provided for the Settlement Class is adequate, taking into
 7 account:
 - 8 (i) the costs, risks, and delay of trial and appeal;
 - 9 (ii) the reasonableness of Rule 23(b)(2) notice of the Settlement to the
 10 Settlement Class Members;
 - 11 (iii) the terms of any proposed Class Representative service awards,
 12 including the timing of payment and any justification for the service
 13 awards; and
 - 14 (iv) any agreement required to be identified under Rule 23(e)(3);
- 15 (D) any Settlement Class Members objected to or commented on the
 16 Settlement; and
- 17 (E) the Settlement treats Settlement Class Members equitably relative to each
 18 other.

19 8. The Court has scrutinized the Settlement and negotiation history for any signs of
 20 potential collusion (*see, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir.
 21 2011)), and finds that the Settlement is not the product of collusion. This finding is supported by,
 22 among other things: the fact that the Settlement was facilitated by experienced, well-qualified
 23 counsel; the Settlement provides substantial benefits to Settlement Class Members; the significant
 24 benefits provided to Settlement Class Members are appropriate under the circumstances of this
 25 Lawsuit; the Settlement was agreed to only after serious, informed, arm's-length negotiations led
 26 by JAMS mediator Read Ambler (Ret.) who conducted three private mediation sessions and
 27 continued supervision and direction over the Parties' settlement efforts; and only after the Parties
 28 reached agreement in principle with respect to the substantive terms of the Settlement, they
 agreed that Class Counsel may move the Court for Google to pay an award of reasonable
 attorneys' fees and expenses, but that Google may contest the amount and that the Parties will

1 accept any Court order on attorneys' fees and expenses. As addressed separately, Google did not
2 oppose the Plaintiffs' motion for an award of fees and expenses.

3 9. Google has agreed to provide the following meaningful injunctive relief. Google
4 has taken several measures to remedy the alleged security vulnerability in its EN System made
5 known to Google and then raised by Plaintiffs in their Amended Complaint in this Lawsuit.
6 These remedial measures include: (i) software code changes Google rolled out to EN users on
7 April 21, May 5, and May 26, 2021 to improve how technical information is logged to Android
8 system logs to provide additional privacy protection for users of contact tracing apps and (ii)
9 implementing and completing a process designed to search for and eliminate the data alleged in
10 the Amended Complaint to have been generated by the EN System prior to the code updates
11 described in subsection (i) in this paragraph and that could have allegedly allowed an inference of
12 COVID status ("EN System data") Google may find within its databases.

13 10. As consideration for the complete and final settlement of the Lawsuit, the releases,
14 and other promises and covenants set forth in the Settlement Agreement, and subject to the other
15 terms and conditions therein, Google shall implement the following injunctive relief: (i) not
16 revert the software code changes described in the Settlement Agreement and in paragraph 9
17 above; (ii) confirm in writing that, after a good-faith, thorough search, it has identified no EN
18 System data on its internal systems from which any employee could draw any inference about the
19 health status of an EN user; (iii) edit the following Google webpage on the EN System,
20 <http://www.google.com/covid19/exposurenofications/>, to revise the "Exposure Notifications and
21 your privacy" section to explain and describe the heightened security and privacy protections that
22 address the concerns that Plaintiffs raised in this Lawsuit and in their Amended Complaint; and
23 (iv) that Plaintiffs may seek from the Court an injunction to enforce the terms of the Settlement
24 Agreement, including Google's Representations and Warranties set forth in Section 4 of the
25 Settlement Agreement, concerning a number of issues central to Plaintiffs' allegations, including
26 the results of Google's own investigation into Plaintiffs' allegations.

11. The Parties are to bear their own costs, except as awarded by this Court in a separate judgment and Order on Attorneys' Fees made pursuant to Federal Rule of Civil Procedure 58.

12. The Parties and Settlement Class Members are bound by the terms and conditions of the Settlement. Upon the Effective Date of this Settlement, Plaintiffs and each and every Settlement Class Member shall be deemed to have released, acquitted and forever discharged the Defendant, from any and all Settled Claims.

13. The Court hereby certifies, pursuant to Fed. R. Civ. P. 23(b)(2), Plaintiffs' claims of (i) intrusion upon seclusion; (ii) public disclosure of private facts; (iii) the California Constitutional Right to Privacy; and (iv) California Confidentiality of Medical Information Act, Cal. Civ. Code §§ 56 *et seq*; on behalf of a Settlement Class defined as follows:

all natural persons in the United States who downloaded or activated a contact tracing app incorporating the Google-Apple Exposure Notification System on their mobile device. Excluded from the Class are Google, its current employees, officers, directors, legal representatives, heirs, successors and wholly or partly owned subsidiaries or affiliated companies; the undersigned counsel for Plaintiffs and their employees; and the judge and court staff to whom this case is assigned.

14. The Court finds that the Settlement Class satisfies the requirements of Federal Rule of Civil Procedure 23(a): (1) Numerosity: the Settlement Class is comprised of millions of individuals, because contract tracing apps have been used by various state agencies and downloaded millions of times in the United States; (2) Commonality: Plaintiffs readily meet this standard because common questions underlie Plaintiffs' claims including, among others, whether Google's EN system data violated reasonable expectations of privacy and was highly offensive to a reasonable person; (3) Typicality: the Class Representatives' claims are typical of those of the Settlement Class Members, because Plaintiffs allege a common course of conduct involving whether Google's EN system logged and shared personally identifying information and confidential medical information from the Class Representatives and other Settlement Class Members; and (4) Adequacy: the Class Representatives and Class Counsel have fairly and adequately protected the interests of the Settlement Class, and shall continue to do so.

1 15. The Court finds that the Settlement Class satisfies the requirements of Federal
2 Rule of Civil Procedure 23(b)(2), because “the party opposing the class has acted or refused to act
3 on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate
4 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). This is because the injunctive relief set
5 forth in the Settlement Agreement would resolve the alleged violations and offer appropriate
6 relief to the entire Settlement Class.

7 16. The Court has reviewed the application for an award of a \$2500 service award to
8 each of the two Class Representatives (totaling \$5000) submitted by Class Counsel and the
9 memoranda of law and other materials submitted regarding that application. The benefits
10 described above are the only consideration the Defendant shall be obligated to give to the
11 Settlement Class Members, with the exception of the service awards to be paid to the Class
12 Representatives, which are supported by – among other things – evidence of the Class
13 Representatives’ active involvement in the Lawsuit. Those service awards shall be paid by
14 Google within twenty-one (21) calendar days of the Effective Date.

15 17. Plaintiffs and Releasing Parties fully and forever release Google and the Released
16 Parties from any and all Settled Claims, and Plaintiffs and Releasing Parties covenant and agree
17 that they will not take any steps whatsoever to assert, sue on, continue, pursue, maintain,
18 prosecute, or enforce any of the Settled Claims, directly or indirectly, against the Released
19 Parties. The obligations incurred pursuant to the Settlement Agreement shall be a full and final
20 disposition of the Lawsuit and any and all Settled Claims, as against all Released Parties. The
21 Settled Claims do not include claims for damages or other monetary relief. The Settled Claims do
22 include causes of action regarding the handling of EN System data on system logs.

23 18. By entering this Order, the Court does not make any finding of liability or
24 wrongdoing as to Google.

25 19. Without affecting the finality of this order or the final judgment in any way, the
26 Court shall retain personal and subject matter jurisdiction over the Lawsuit after the entry of the
27 Final Approval Order to oversee the implementation and enforcement of this Settlement
28 Agreement, the order preliminarily approving the Settlement Agreement, the Final Approval

1 Order, and the determination of Class Counsel's request for reasonable attorneys' fees, expenses,
2 and any award thereon. Plaintiffs' Class Counsel is ordered to file a post-distribution accounting
3 and status report within 14 days after the Settlement Agreement has been fully implemented.

4
5
6 **IT IS SO ORDERED.**

7 Dated: October 31, 2022

8 
9 HON. NATHANAEL M. COUSINS
10 UNITED STATES MAGISTRATE JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28